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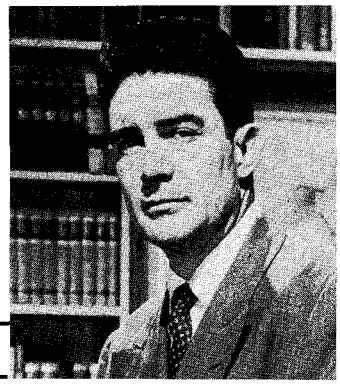

DAN SMOOT

EARL WARREN COURT—PART III

"If some partial inconveniences should appear to be connected with the incorporation of any of . . . [the federal judiciary powers] into the . . . [Constitution] it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences." — *Alexander Hamilton, in* The Federalist Papers, No. 80

In less than four years after Earl Warren became Chief Justice of the U. S. Supreme Court (in October, 1953), the Court had made a shambles of the nation's internal security laws and procedures and had shattered the juridical and constitutional principles on which our American system is built. There was insistent, widespread demand that something be done.

On February 22, 1957, the General Assembly of Georgia unanimously adopted a resolution calling for impeachment of six members of the U. S. Supreme Court. On June 24, 1957, it was announced in Washington that U. S. Representatives Noah M. Mason (Illinois Republican) and George W. Andrews (Alabama Democrat) would sponsor a movement to start impeachment proceedings against all members of the Supreme Court. No action toward impeachment ensued.

On June 24, 1957, U. S. Senators James O. Eastland and Olin D. Johnston (Democrats, Mississippi and South Carolina) proposed a constitutional amendment to make Supreme Court justices subject to Senate approval every four years. This proposal died in committee.

In August, 1957, U. S. Senator William E. Jenner (Indiana Republican) introduced a bill to limit the Court's appellate jurisdiction in five broad categories of cases. By June, 1958, the Jenner Bill had been laid aside for the Butler Bill, which was intended only to eliminate harmful effects of the Warren Court's Steve Nelson case decision (nullifying state laws against sedition and subversive activities). The House passed the Butler Bill in 1958, but it was defeated in the Senate by one vote. Lyndon B. Johnson, then majority leader of the Senate, voted against the Butler Bill.[1]

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In January, 1961, U. S. Senator John L. McClellan (Arkansas Democrat) and U. S. Representative Howard W. Smith (Virginia Democrat) introduced bills embodying the proposal of the Butler Bill of 1958; but the McClellan and Smith bills never got out of committee.

Within a week after the Warren Court's June 25, 1962, New York School Prayer Case decision, 35 U. S. Representatives had proposed 36 different bills to do something about this ruling; and 18 Senators were sponsoring similar bills in the Senate. Not one of the bills got out of committee.

On August 12, 1963, the House passed the District of Columbia Omnibus Crime Bill which, among other things, nullified some harmful effects of the Warren Court's 1957 Mallory case decision. The Senate refused to act on this bill.[10]

Congressional dismay over the Warren Court's June 15, 1964, apportionment decisions resulted in positive action by the House of Representatives. On August 19, 1964, the House, by a stand of 231 to 188, passed the Tuck Bill, which stated that federal courts have no jurisdiction in cases involving legislative apportionment in the states. The Tuck Bill died, because the Senate refused to act on it. The Tuck Bill (HR 1584) was reintroduced in the present Congress on January 5, 1965.

In 1964, the General Assembly of the States (an agency of the Council of State Governments) suggested that state governments petition Congress to convene a constitutional convention to write an amendment limiting the power of federal courts in state legislative apportionment matters. By the first of March, 1965, 21 states had so petitioned Congress. If 34 states (two-thirds of all in the union) petition, Congress must, under the Constitution, call the convention. This method of submitting a constitutional amendment (for approval by the people, through state conventions or state legislatures) has never been used.[2]

It is generally believed that sponsors of this movement do not really want a constitutional convention. They hope, rather, that the petitioning will force Congress itself to propose a constitutional amendment.[2]

During the first ten days of the 89th Congress (1965), members of Congress introduced 71 resolutions proposing constitutional amendments to limit the jurisdiction of the U. S. Supreme Court or to offset harmful effects of the Court's recent decisions. Fifty-one of the proposed amendments were aimed at the Court's state-legislative apportionment decisions; 15, against the Court's decisions outlawing prayer and Bible-reading in public schools; five, against other Warren Court usurpations of power.[3]

What Should Be Done

One fundamental principle of our constitutional system is that the Constitution is a binding contract, meaning exactly what it says, to be obeyed explicitly by all agencies of the federal government. Even if the President, all members of Congress, and the total population want something done, the federal government cannot legally do it, unless the Constitution clearly authorizes the desired action.

If — for any purpose whatever — the federal government acts without clear constitutional authority, then we have *unauthorized, lawless* government.

Since human beings — including Presidents and members of Congress — are fallible, it is inevitable that Congress will occasionally enact, and the President will approve, a law which the President and a majority of Congress *think* the Constitution authorizes — but which others *think* the Constitution does not authorize.

If the constitutionality of such a law — or any law — is tested in the courts, no court has authority to consider the social, economic, political or other *merits* or *demerits* of the law. No court can validly consider such questions as whether the law would be good or bad for the country or whether the people seem to want or not want the law. A court can legally consider only one question: Does the Constitution as amended obviously give the federal government power to enact the law? In deciding this question, the court cannot validly entertain such considerations as modern needs or changing times, or altered con-

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ditions in our society. In making its decision, the court cannot legally rely on its own, or any other, contemporary opinion about the meaning of the constitutional provision in question. Legally, the court must restrict itself to determining what the constitutional provision in question meant *at the time it was written and adopted, to the people who wrote and adopted it.*

The *original* intent of any provision of the Constitution as amended *must* be determined by the *original* historical record of that provision. In the case of a provision in the Constitution itself, the original record consists of debates at the Constitutional Convention of 1787; discussions of the provision in the *Federalist Papers* (a collection of essays written by James Madison, Alexander Hamilton, and John Jay, explaining the meaning of the Constitution, to persuade the people of the states to approve ratification); and official debates in the states which ratified the Constitution.

In the case of a constitutional amendment, the records revealing its *original* intent consist of debates in the national Congress which submitted the amendment, and debates in the states which adopted it.

Generally, the language of the Constitution and the historical record will clearly reveal that the Constitution does or does not grant a power which the federal government assumes in enacting a law. In rare instances where there may be reasonable doubt whether the government does or does not have the power assumed, the law in question is unconstitutional. It is an absolute certainty that the intent of the people who wrote the Constitution, and of those who adopted it, was to establish a limited government of *enumerated* powers. Hence, if the Constitution does not *obviously enumerate* a power, the federal government cannot lawfully assume that power.

What is the remedy if the Constitution does not clearly authorize federal action which the people want? The remedy is *not* for the Supreme Court to reinterpret the Constitution — to decide that it now means, or should mean, something different from what it originally meant. The only legal remedy is for the people, acting through processes specified in their Constitution, to amend the Constitution and give the federal government clear authority to do what the people want it to do.

What is the remedy if the Supreme Court hands down a decision which clearly violates the original intent of the Constitution?

Article 3, Section 2, clause 2 of the Constitution says:

" . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make."

This means that the Supreme Court has no authority to hear any case on appeal unless Congress has specifically granted such authority. This rule was first enunciated by the Supreme Court in 1796, in the case of *Wiscart versus Dauchy.*[4]

Chief Justice John Marshall reaffirmed the rule in 1810 in the case of *Durousseau versus United States.*[4]

The most emphatic statement that the appellate jurisdiction of the Supreme Court is totally dependent on Congress — that Congress can give or take away the Court's authority to hear cases — is in *United States versus Bitty.* In this case, decided in 1908, the Supreme Court held *that there is no right to appeal to the Supreme Court except as an act of Congress confers it.*[4]

The most dramatic demonstration of congressional power over the Supreme Court is in the McCardle Case of 1868. From page 614 of Senate Document No. 170:

"The power of Congress to make exceptions to the court's appellate jurisdiction has thus become, in effect, a plenary power to bestow, withhold, and withdraw appellate jurisdiction, even to the point of its abolition. And this power extends to the withdrawal of appellate jurisdiction even in pending cases. In the notable case of Ex parte McCardle, a Mississippi newspaper editor who was being held in custody by the military authorities acting under the authority of the Reconstruction Acts filed a petition for a writ of *habeas corpus* in the circuit court for

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Southern Mississippi. He alleged unlawful restraint and challenged the validity [of] the Reconstruction statutes. The writ was issued, but after a hearing the prisoner was remanded to the custody of the military authorities. McCardle then appealed to the Supreme Court which . . . heard arguments on the merits of the case, and took it under advisement. Before a conference could be held, Congress, fearful of a test of the Reconstruction Acts, enacted a statute withdrawing appellate jurisdiction from the Court in certain *habeas corpus* proceedings. The Court then proceeded to dismiss the appeal for want of jurisdiction . . . ."[4]

In addition to *Wiscart versus Dauchy* in 1796; *Durousseau versus United States* in 1810; *Ex parte McCardle* in 1868; and *United States versus Bitty* in 1908, here are other cases in which the Supreme Court holds, or by its meaning proves, that the Court cannot legally hear a case on appeal and render a valid decision unless Congress has specifically granted the Court appellate jurisdiction to handle that kind of case:

Ex parte Yerger in 1896; *Railroad Co. versus Grant* in 1878; *Kurtz versus Moffitt* in 1885; *Cross versus Burke* in 1892; *Missouri versus Missouri Pacific Railroad Company* in 1934; and *Stephan versus United States* in 1943.[4]

A constitutional amendment to offset an unconstitutional court decision would do more harm than good.

For example, most of the proposed amendments resulting from the New York School Prayer Case decision would *authorize* prayer and Bible-reading in public schools. Such proposals imply that the present Constitution outlaws prayer and Bible-reading, and that the Warren Court was constitutionally correct in its Prayer Case decision. The implications are false. This decision *violated* the Constitution which clearly *prohibits* any agency of the federal government from meddling in educational and religious matters.

Most of the proposed amendments resulting from the Warren Court's legislative apportionment decisions would *authorize* states to have one legislative chamber whose members are not elected entirely on the basis of population. Such proposals imply that the states do not already have that authority and that the Warren Court was constitutionally correct in its legislative apportionment decisions. The implications are false. Under the Constitution, *as is*, states have full authority to make such legislative apportionment as they please, and federal courts have *no* authority to intervene.

The proper remedy against *all* Warren Court decisions harmful to our nation is simple legislative enactment. Congress should pass a law saying the federal courts never did have, do not now have, and never shall have appellate jurisdiction in any case affecting religious or educational matters; in any case affecting procedures of state courts or laws enacted by state legislatures; in any case affecting state and local legislative or executive actions involving efforts to control subversive activities; in any case affecting investigative activities of the national Congress.

To eliminate damage already done, the law should declare null and void all federal court decisions in these fields.

Fourteenth Amendment

Most of the Warren Court's damaging decisions are based on the Fourteenth Amendment which is not a valid part of our Constitution.

The power to amend the Constitution resides, exclusively, in *the people of states in the union*—who have an absolute right to reject, or accept, a proposed amendment, without any kind of coercion from any branch or agency of the federal government. It is important to keep this in mind while reviewing the history of the Fourteenth Amendment.

During the Civil War, Charles Sumner of Massachusetts (radical leader in the Senate) and Thaddeus Stevens of Pennsylvania (radical leader in the House) wanted President Abraham Lincoln to consider the southern states territories or alien lands outside the union, so that they could be treated as conquered provinces if the north won

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the war. Lincoln refused to do this. Lincoln maintained that the American union was indivisible; that the war was being fought, *not* to abolish slavery, but to suppress rebellion which threatened to dismember the union.[5]

On December 8, 1863, Lincoln formally emphasized this doctrine by issuing a proclamation, promising amnesty (forgiveness) to people in the confederate states who would swear an oath of allegiance to the Constitution and to the union, and promise to obey laws and proclamations abolishing slavery.[5] Inasmuch as the north won the war, Lincoln's point was proved: the southern states never did secede from the union; they merely tried to.

The day hostilities ended, therefore, the southern states were constitutionally entitled to full representation in the national Congress. The federal government could not legally lay down conditions for "readmitting" the southern states, because, according to the doctrine of Lincoln and the decision of war, they had never left the union.

On April 14, 1865, Lincoln was assassinated; but on May 29, his successor—Andrew Johnson—issued a proclamation of amnesty patterned on Lincoln's proclamation of December, 1863. On the same day, Johnson also issued a proclamation to carry out Lincoln's plan of reconstruction. Johnson's proclamation set up a provisional government for North Carolina, appointing a governor to call a convention chosen by the people of the state for the purpose of establishing a permanent state government. The persons qualified to vote for delegates to this convention were those who had been qualified to vote prior to the Civil War—and who had taken the required oath of amnesty.[5]

By July 13, 1865, President Johnson had applied this Lincoln formula for reconstruction to all remaining states in the confederacy. Before Congress convened in December, 1865, all confederate states (except Texas, which delayed until the spring of 1866) had thus established legitimate governments. And, *as states*, all (except Mississippi and Texas), had ratified the Thirteenth Amendment, abolishing slavery.[6]

But when Congress convened in December, 1865, the radicals in control refused to seat Representatives and Senators from the confederate states. Therefore, it was an *illegal* Congress, because it denied representation to states constitutionally entitled to representation.

On April 9, 1866, the illegal Congress enacted the Civil Rights Bill, over President Johnson's veto. To place this measure beyond the danger of overthrow by the courts, or by a subsequent, legal Congress, the radical Congress incorporated the essential provisions of the Civil Rights Bill in a Resolution proposing the Fourteenth Amendment.[4]

The Resolution proposing the Fourteenth Amendment passed the Senate on June 8, 1866, by a vote of 33 to 11, with five Senators not voting. On June 13, 1866, the House took a final vote on the resolution: 120 Representatives for the proposal, 32 opposed, and 32 not voting.[7]

This vote in the House would not have been valid, *even in a legal Congress*, because it did not meet the constitutional requirement that a resolution proposing a constitutional amendment must be approved by two-thirds of both Houses. There were 184 Representatives in the illegal Congress on June 13, 1866. Two-thirds of that number would have been 123. Only 120 voted for the Resolution proposing the Fourteenth Amendment.[7]

Nonetheless, the leadership of Congress arbitrarily declared the Resolution enacted. Congress submitted the Fourteenth Amendment proposal to all states for ratification—including the confederate states which had been denied representation.

Tennessee was the only confederate state which voluntarily ratified the Fourteenth Amendment. The other ten confederate states (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia) rejected it. Four states outside the old confederacy also rejected the Amendment: Cali-

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fornia, Delaware, Kentucky, and Maryland. Iowa did not ratify the Fourteenth Amendment until April 3, 1868; and Massachusetts did not ratify until March 20, 1867.

Thus, by the first of March, 1867, only 21 of the then 37 states said to be in the union had ratified the proposed Fourteenth Amendment.[8] At least 28 states had to ratify, to meet the constitutional requirement that amendments must be approved by three-fourths of all states.

So, on March 2, 1867, Congress passed the Reconstruction Act, abolishing governments in the ten confederate states which had rejected the Fourteenth Amendment. The Act placed these ten states under military dictatorship, requiring the commanding generals to prepare the rolls of voters for conventions to formulate governments acceptable to Congress.

Everyone who had served in the Confederate armed forces was denied the right to vote or to hold office—despite the presidential proclamation of amnesty. Virtually the only persons permitted to vote or to hold office were negroes, southern scalawags, and carpetbaggers from the north and from foreign countries.[5,6,7] The Reconstruction Act provided that when the legislatures of these reconstruction governments ratified the Fourteenth Amendment, the states would be admitted to the union—although the Constitution clearly provides that only states already in the union can act on amendments, and gives Congress no authority to coerce action on amendments.

Congress denied southern states judicial relief, by intimidating the Supreme Court into silence—threatening to abolish the Court's appellate jurisdiction, or to abolish the Court itself, by constitutional amendment.

When Mississippi attempted to secure a court injunction to prevent the President from enforcing the unconstitutional Reconstruction Act (and when Georgia asked for an injunction to keep army officers from enforcing the Act), the Supreme Court refused to hear the cases. Chief Justice Salmon P. Chase said that even if the Court heard the cases and granted the injunctions, it could not enforce its decrees.[9]

President Andrew Johnson called the Reconstruction Act a "bill of attainder against nine million people at once."[9]

During debates in the Senate, over passage of the Act, Senator Doolittle of Wisconsin, condemning the radicals for what they were doing, said:

"The people of the South have rejected the constitutional amendment [the Fourteenth], and therefore we will march upon them and force them to adopt it at the point of the bayonet, and establish military power over them until they do adopt it."[9]

That is precisely what happened: Army bayonets escorted illiterate negroes and white carpetbaggers to the polls, keeping most southern whites away.

By July 20, 1868, Iowa and Massachusetts had ratified the Fourteenth Amendment, and the legislatures of six "reconstructed" confederate states (Alabama, Arkansas, Florida, Louisiana, North Carolina, South Carolina) had ratified. These eight new ratifications, plus the 21 which had been completed before March, 1867, made a total of 29 state ratifications by July 20, 1868.

But legislators of two northern states had changed their minds. Their sense of decency outraged by the whole monstrous procedure, legislators of New Jersey (on March 24, 1868) and of Ohio (on January 15, 1868) withdrew their ratifications, and rejected the Fourteenth Amendment. Consequently, there were still not enough ratifications to adopt the Amendment. There had to be 28. There were only 27.[8,9]

On July 20, 1868, Secretary of State William H. Seward proclaimed that three-fourths of the states *had* ratified the Fourteenth Amendment—*if* the legislatures which ratified in the six confederate states were *authentically organized,* and *if* New Jersey and Ohio were not allowed to reject the Amendment. The radical Congress did not like Secretary Seward's equivocation about legality.[8,9]

On July 21, 1868, Congress passed a joint resolution declaring the Fourteenth Amendment a valid part of the Constitution, directing Seward

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to proclaim it as such. On July 28, 1868, Secretary Seward certified, without reservation, that the Amendment was part of the Constitution.[4,5]

Freedom of the slave race was, ostensibly, the exclusive purpose of the framers of the Fourteenth Amendment. Yet, as soon as the Amendment was declared adopted, efforts were made to use it as a weapon to destroy states rights. Groups and individuals, who did not like certain local or state laws, brought cases into federal courts, claiming the Fourteenth Amendment gave the federal government authority to supervise activities of state and local governments.

In 1873, the Supreme Court heard the first case testing this doctrine, and held that the Fourteenth Amendment did *not* authorize federal intervention in state and local affairs. The Court said the real purpose of those who claimed such federal authority under the Fourteenth Amendment, "was to centralize in the hands of the federal government powers hitherto exercised by the states."[4]

To foster such intentions, the Court declared, would be

". . . to constitute this Court a perpetual censor upon all legislation of the States . . . with authority to nullify such as it did not approve . . . .

"The effect of so great a departure from the structure and spirit of our institutions is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers, heretofore universally conceded to them, of the most ordinary and fundamental character.

"We are convinced that no such results were intended by the Congress, nor by the legislatures which ratified this Fourteenth Amendment."[4]

The Court's position on this point began to weaken at the turn of the century; and, by the 1930's, the Court had begun to assume jurisdiction, under the Fourteenth Amendment, to act as "censor upon . . . legislation of the states."

The Warren Court has used the Fourteenth Amendment to convert itself into a judicial oligarchy, with unlimited power to do what it pleases.

Obviously, we need to eliminate the Fourteenth Amendment and nullify all court decisions, executive actions, administrative regulations, and laws based on it.

How? By simple legislative enactment, Congress could proclaim the Amendment invalid; but this would be dangerous. It could set a precedent which Congress might try to use in eliminating a *valid* amendment to the Constitution.

Congress could enact a resolution proposing repeal of the Fourteenth Amendment; but this would imply that the Amendment is now legal.

The only proper remedy appears to be a resolution by Congress *re-submitting* the Fourteenth Amendment to all states for proper ratification or rejection.

In other words, this vital question should be resolved not by some branch or agency of government, but by the people themselves, acting through their state legislatures by due constitutional process. If the people want the Fourteenth Amendment and all that it has produced, they could persuade three-fourths of the state legislatures to ratify it legally.

NEXT WEEK

We will conclude this four-part series on the Earl Warren Court.

FOOTNOTES

For specific information on Supreme Court decisions mentioned herein, see this *Report*, "Earl Warren Court — Part I."

(1) *Congressional Record*, August 21, 1958, p. 17437 (daily)
(2) "21 States Pressing For Apportionment Amendment," *Congressional Quarterly Weekly Report*, March 5, 1965, pp. 339, 359
(3) "Amendments Hit The Court," by Ken Thompson, *The Dallas Morning News*, February 22, 1965, Sec. 4, p. 2
(4) *The Constitution of the United States of America, Analysis and Interpretation: Annotations of Cases Decided by the Supreme Court of the United States to June* 30, 1952, prepared by the Legislative Reference Service of the Library of Congress and edited by Edward S. Corwin, published as Senate Document 170, May 30, 1953, pp. 614-6, 749-49, 966-78
(5) *The Encyclopedia Britannica*, Fourteenth Edition, Vol. 22, pp. 810 ff.
(6) *Andrew Johnson: A Study In Courage*, by Lloyd Paul Stryker, The MacMillan Company, New York, 1929, Chapter XXVI
(7) *A Brochure On The 14th Amendment*, written and published by John B. Mason, 357 East Wood, Raymondville, Texas, 1956
(8) *The Fourteenth Amendment To The Constitution Of The United States, A Study*, written and published by Walter E. Long, P. O. Box 1, Austin, Texas, 1960
(9) "The Dubious Origin Of The Fourteenth Amendment," by Walter J. Suthon, Jr., *Tulane Law Review*, Vol. XVIII, New Orleans, Louisiana, December, 1953, pp. 22-44
(10) Introduced as HR 5688 in the present Congress, this bill to nullify harmful effects of the Mallory Rule was again passed by the House on March 22, 1965. It now awaits action in the Senate.

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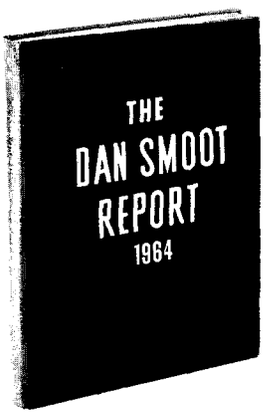

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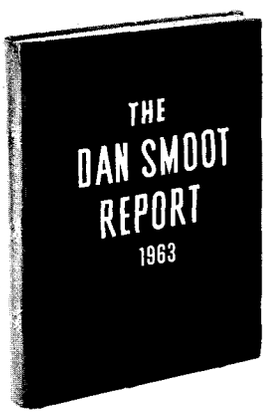

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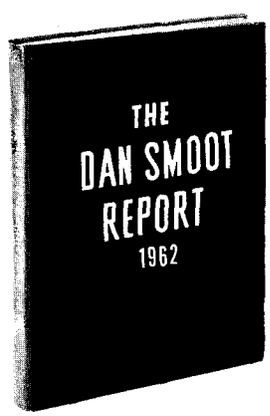

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